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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANTONIO DEJESUS ESQUIVEL, Defendant and Appellant.	A162105 (Contra Costa County Super. Ct. No. 51200237)

In 2016, a jury convicted appellant Antonio DeJesus Esquivel of first degree murder under Penal Code section 187[1] with true findings on gang enhancement allegations under section 186.22, subdivision (b)(1) and firearm enhancement allegations under section 12022.53, subdivisions (d) and (e)(1). Esquivel was also convicted of unlawfully carrying a loaded firearm within an incorporated city under section 12031, subdivision (a)(1) and of being an active participant in a criminal street gang under section 186.22, subdivision (a) (section 186.22(a)).

In this appeal, Esquivel challenges the trial court's order denying his request to strike or reduce the 25-year-term firearm enhancement imposed against him under section 12022.53 subdivision (d) (section 12022.53(d)). We

[1] All further statutory references are to the Penal Code unless otherwise stated.

reverse the trial court's order declining to strike the enhancement. In the recently decided *People v. Tirado* (2022) 12 Cal.5th 688 (*Tirado II*), our Supreme Court concluded that section 122022.53, subdivision (h) (section 122022.53(h)) allows a court to strike a greater firearm enhancement under section 12022.53(d) and impose a lesser uncharged enhancement instead. Under this new authority, the trial court erred when it denied Esquivel's request to strike or reduce the firearm enhancement based on the erroneous belief it lacked authority to impose a lesser included enhancement in its place.

Esquivel raises additional challenges based on changes to the criminal gang statute instituted by Assembly Bill No. 333 (2021–2022 Reg. Sess.) (Stats. 2021, ch. 699) (AB 333), enacted in January 2022 while his appeal was still pending. He contends AB 333, which increased the evidentiary requirements under the section 186.22 criminal gang statute, requires reversal of the entire judgment against him, or at least his section 186.22(a) conviction for being an active participant in a criminal street gang and the true finding on the section 186.22, subdivision (b) (section 186.22(b)) gang enhancement alleged in connection with his first degree murder conviction.

While we reject Esquivel's contention that AB 333 warrants reversal of the entire judgment against him, we vacate his section 186.22(a) gang offense conviction and section 186.22(b) true gang enhancement finding associated with his first degree murder conviction. AB 333 raised the bar of proof for the gang offense and gang enhancement in several ways, and the jury never made determinations concerning the sufficiency of proof for either under the amended statute.

The matter is remanded for further proceedings. On remand, the People may elect to retry Esquivel on the gang offense and gang

enhancement allegations under the new law established by AB 333. If the People do not elect to retry Esquivel, then the trial court shall resentence him accordingly. In resentencing, the trial court may also consider whether to strike the greater firearm enhancement and impose a lesser included enhancement in its place. We affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

We detailed the factual and procedural background of this case in our earlier nonpublished decision affirming Esquivel's convictions. (See *People v. Esquivel* (Case No. A149692, June 25, 2019 [nonpub. opn.] (*Esquivel I*).) We repeat the basic facts from that case nearly verbatim and include from the trial court record in case no. A149692 additional facts in the discussion section to the extent necessary to address Esquivel's contentions on appeal.

The charges filed against Esquivel arose from an incident that took place the evening of May 22, 2011, when the then 21-year-old defendant killed Bridain Harold. The evidentiary portion of the trial was presented over the course of 20 days spanning January 27 to March 2, 2016. The jury heard the testimony of over 30 witnesses and considered over 150 exhibits.

The People's position at trial was that Esquivel murdered Harold and had not acted in either perfect or imperfect self-defense. The evening of the shooting, Esquivel armed himself with a loaded handgun. He and his friend Steven A. drove to the neighborhood where Harold lived; Steven A. was driving while defendant was in the passenger seat. Harold and his friend were standing in the street outside the Harold's home. Steven A. stopped the car in the middle of the street and the "passenger door flew open."

Esquivel exited the car and approached Harold. Harold took a step off the sidewalk and into the street, but soon thereafter he turned to walk back onto the sidewalk. Throughout Esquivel's approach, he had an "[a]ggressive"

and "determined" look of "anger," while Harold displayed a "What's-this-about kind of demeanor" without any "aggression." While standing some distance from Harold and Harold's friend, Esquivel pulled out his gun and began firing at the two men. At first, the gun appeared to misfire and dislodged a couple of unspent rounds, allowing the victim and his friend to attempt to run away. Esquivel continued to fire the gun and ultimately struck Harold twice. Harold fell to the ground. Esquivel and Steven A. punched and kicked Harold as he laid on the ground then fled the scene. Harold stood up and "stumbl[ed] back" over to the sidewalk.

The People's forensic evidence established Harold had been shot twice, one bullet entering his left temple and another one entering his chest. The bullet that entered Harold's chest, puncturing his lung, would have allowed Harold to move; the bullet that entered his left temple, traveling downwards and puncturing the aorta and heart, would have caused death "within 30 seconds." As the bullets entered Harold's body in a downward trajectory, the pathologist testified that if Harold had been standing, he had to have been leaning forward or bent over at the waist when shot. The pathologist further testified that neither wound had any stippling or soot and that, typically, "[i]f the target surface is within the six to nine inches from the gun barrel, you would see soot. If it's about 18 inches, you would see soot and . . . stippling." "The soot is easily wiped off. The stippling does not wipe off." If the gun were a "larger caliber weapon," the "stippling may happen from 18 inches away. With the smaller caliber," nine inches would be a reasonable range to expect to see stippling, but it depended more on the age of the bullet, the charge in the bullet, and the load when the bullet was manufactured. Because the pathologist had not seen any stippling, he opined the gunshot wound in the chest was not "a close contact wound." While Harold's overall

condition, including his hands, indicated he had been in a physical altercation, the injuries on his hands did not indicate his "hands were used as a weapon."

Esquivel's position at trial was that he shot Harold in perfect self-defense. Approximately six months before the shooting, in October 2010, he and Harold were involved in a physical altercation. Esquivel claimed Harold had tackled him and sent him over a railing several feet above the ground, but Esquivel kept himself from falling by holding on to the railing. Harold punched Esquivel in the face before other men attacked him and distracted him from further assaulting Esquivel. Esquivel then fled the area, but a week later someone told him that Harold was mad at him and had threatened to "kill" him.

Some six months thereafter, on the day of the shooting, Esquivel and his friend Steven A. drove to see a friend of Steven A., and Esquivel did not know Harold lived in the neighborhood. As Steven A. began to park the car, Esquivel saw Harold and another man standing on the street corner. Esquivel told Steven A. they could not park there, and Steven A. turned the car around and parked facing the opposite direction. Esquivel told Steven A. that he would get out of the car quickly, get the friend, and then the three men would go somewhere else. Esquivel believed Harold and his friend had not recognized him, so he got out of the car and walked toward the friend's house.

As soon as Esquivel crossed in front of the car, he saw both Harold and his friend "coming straight at" him and he saw Harold "start reaching in his pocket." When Harold and his friend were "around ten feet" from Esquivel, Esquivel drew his gun, cocked it to let the two men know it was loaded, pointed it at the two men, and told them to "[b]ack up[ ] and be cool."

Esquivel had a gun with him because he and Steven A. had been robbed in 2007, there were many unsafe places, and he needed the gun for protection.

In response, Harold stopped and ran toward Esquivel's left, while Harold's friend turned and ran away towards Esquivel's right. Esquivel "slightly" lowered his gun and watched Harold's friend run away. As Esquivel turned to look for Harold, Harold "charg[ed] . . . and tackle[d]" him. As Esquivel fell backward, he wrapped one hand around Harold's neck to immobilize him and used his other hand – which was holding the gun – to break his fall. Harold punched Esquivel in the mouth and bit him, forcing Esquivel to loosen his grip. As Esquivel hit the ground, the gun – still in his hand – went off. Harold was then on top of Esquivel, hit him in the mouth, and bit him on the hand. Esquivel "slightly" released Harold, who "instantly [got] slightly up and started reaching for the gun." What next ensued was a tug of war over the gun with Harold pulling on the gun being held by Esquivel. Esquivel's grip loosened such that he was "slightly holding it;" Harold then tried to tug hard on the gun and his hand slipped off. As soon as Harold's hand slipped off, Esquivel started shooting in his general direction. Esquivel was scared and fired the gun two or three times. Harold pushed himself off Esquivel and ran away. Believing Harold was still alive, Esquivel ran back to the car, put the gun in his pocket, and told Steven A. to drive.

The jury convicted Esquivel of first degree murder (§ 187) with true findings on an alleged gang enhancement (§ 186.22, subd. (b)(1)) and a firearm enhancement (§ 12022.53, subds. (d), (e)(1)); unlawfully carrying a loaded firearm within an incorporated city (§ 12031, subd. (a)(1)); and active participation in a criminal street gang (§ 186.22, subd. (a).) The trial court sentenced Esquivel to an aggregate term of 50 years to life in state prison,

which included the mandatory 25-year term for the section 12022.53(d) firearm enhancement. Esquivel appealed.

In June 2019, this court affirmed the judgment of conviction but remanded the case for resentencing to allow the trial court to consider its new discretion to strike the firearm enhancement under Senate Bill No. 620 (2017–2018 Reg. Sess.) (Stats. 2017, ch. 682 §§ 1–2) (SB 620), which amended section 12022.53(h) to grant courts discretion to strike or dismiss a firearm enhancement imposed under section 12022.53 in the interest of justice pursuant to section 1385. We "remanded to the trial court for resentencing limited to determining whether the firearm enhancement should be stricken or dismissed" under section 12022.53(h) and stated that if the enhancement were not stricken or dismissed, "then the sentence on that enhancement shall be reinstated as originally imposed." On remand, the trial court denied Esquivel's request to strike his firearm enhancement or substitute a lesser enhancement. Esquivel appealed the order.

On February 7, 2022, we issued an opinion in which we reversed the order denying Esquivel's motion for resentencing and remanded the case for resentencing so the trial court could consider whether to strike the greater firearm enhancement and impose a lesser included enhancement in its place.

Esquivel petitioned the Supreme Court for review of our February 7, 2022 opinion. He did not seek review of our reversal of the trial court's order denying his motion for resentencing but rather sought transfer of his case for us to address a claim not raised in his appellate briefs, namely, the application of recently enacted AB 333 to his case. The Supreme Court granted Esquivel's petition for review and transferred the matter back to us "with directions to vacate [our] decision and reconsider the cause in light of [AB 333]." Upon transfer, Esquivel submitted a supplemental opening brief

asserting his contentions with respect to AB 333. The People filed a letter brief in response.

We address Esquivel's contentions as to the firearm enhancement as well as the contentions he raises as to the application of AB 333 to his case.

DISCUSSION

A. The Firearm Enhancement[2]

Esquivel contends the trial court did not fully and correctly understand the scope of its discretionary sentencing powers and erroneously concluded it lacked authority to strike his firearm enhancement and impose a lesser firearm enhancement. He avers we should reverse the trial court's order and remand his case for the trial court to reconsider whether to strike the firearm enhancement and impose a lesser included firearm enhancement. Based on recent Supreme Court authority, we agree.

1. Additional Background Facts

After we remanded for resentencing in Esquivel's first appeal, Esquivel filed sentencing memoranda for the resentencing hearing to apprise the court of his postconviction conduct. While in prison, he worked as a porter, housing clerk, and literacy tutor. He was pursuing a college degree and was one of twelve incarcerated students in the state to have received a scholarship to support his further education. He completed an "Alternatives to Violence" course. To date, he had received no write-ups for violent behavior, only one for having a cell phone. Esquivel noted he was 21-years-old when he committed the crime and was now 30-years-old with four years of prison served during which time he had made substantial progress in his emotional

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[2] As noted, on February 7, 2022, we originally filed an opinion in this case addressing Esquivel's contentions regarding the firearm enhancement. Since that opinion was vacated by our Supreme Court, this opinion constitutes the opinion of the court on this matter.

and mental development. He asked the court to exercise its discretion to strike the 25-year-term firearm enhancement. On November 13, 2020, Esquivel filed a separate memorandum of points and authorities asserting that if the court was not inclined to strike his 25-year-term firearm enhancement outright, under *People v. Morrison* (2019) 34 Cal.App.5th 217 (*Morrison*), it had discretion to impose a lesser enhancement under sections 12022.53, subdivision (b) or (c), as a "middle ground" to the lifetime enhancement under subdivision (d).

In its written opposition, the prosecution commended Esquivel's efforts to better himself and the absence of any write-ups for acts of gang violence while incarcerated but contended those steps were not enough to overcome murdering Harold or subsequent gang-related conduct pending trial.

At the February 19, 2021, resentencing hearing, Esquivel's counsel explained that its November 13, 2020 memorandum of points and authorities no longer reflected the state of the law with respect to a court's ability to impose a lesser firearm enhancement instead of striking the enhancement outright as *People v. Delavega* (2021) 59 Cal.App.5th 1074 (*Delavega*), review granted Apr. 14, 2021, S27293, had recently held the court could not impose a lesser firearm enhancement unless one of those lesser enhancements had been pled and found true by the jury. The court noted another case, *People v. Garcia* (2020) 46 Cal.App.5th 786 (*Garcia*), review granted June 10, 2020, S261772, reached the same conclusion as *Delavega*. Defense counsel anticipated the California Supreme Court would likely resolve the split in authority between *Morrison* and *Delavega*/*Garcia*.

Defense counsel then turned to Esquivel's growth in the four years since his sentence. He was studious and dedicated to getting a college degree and the scholarship spoke volumes about his dedication and commitment to

becoming a better person. He had exhibited the type of reformation the court would appreciate. Given the choices before the court, defense counsel asked the court to strike the 25-year-term firearm enhancement.

The prosecutor stated she was impressed with the steps Esquivel had taken and noted he was "really making amazing strides." However, his crime was horrific as it involved firing several rounds at an unarmed and unsuspecting victim in the middle of a neighborhood to enhance a gang's reputation and his own personal standing. As he awaited trial, he also engaged in heinous behavior, outright attacks on unsuspecting people and threats to potential witnesses for the prosecution. In the prosecution's view, Esquivel's "[a]ctions in the past simply [did] not warrant a reduction or a dismissal of an enhancement at this time."

The court also heard from Esquivel: He had been wrong and was "truly sorry to everybody involved." He realized that prison was not the place he wanted to be, so he made a choice to not lose hope and instead chose to better himself. He aspired to go to college, complete as many programs as possible, and stay out of trouble. He explained the "lower-level prison" he would soon go to would allow him to make further academic progress, as well as participate in programs regarding victim awareness and gang awareness. While not diminishing what he had done in the past, he was doing everything he could to better himself.

After commending Esquivel on his efforts "to do something with his life" while in prison, the court recounted the "very serious and stark" facts of his case. The evidence showed Esquivel, along with another gang member, had gone looking for Harold, who was not posing any danger to Esquivel at the time, and shot him dead on the street. Balancing Esquivel's "laudable" efforts in prison against the facts of his crime, and faced with "a binary choice

between striking the 25-year enhancement or not," the court declined to strike the enhancement. The court added: "I can say this, and this may be some source of hope for you, Mr. Esquivel, that if I had a choice in the future of accepting a lesser-included firearm enhancement in the future and balancing that against what you've done while you have been in [California Department of Corrections and Rehabilitation], I might very well decide that in your favor." The court stated that if the Supreme Court allowed the reduction of the firearm enhancement to some lesser enhancement rather than the "25 or nothing alternative," it "might very well consider a positive decision in [Esquivel's] favor" if Esquivel continued his positive efforts while in custody. In the court's view, such an approach would better balance the facts of the case and Esquivel's efforts to improve himself while incarcerated. On this basis, the court denied Esquivel's request to strike his firearm enhancement or substitute a lesser enhancement.

2. Applicable Law

Section 12022.53 provides three different escalating sentence enhancements for the personal use of a firearm in the commission of specified felonies, including murder. (See § 12022.53, subds. (b)–(d).) These consist of a 10-year enhancement for the personal use of a firearm under section 12022.53, subdivision (b) (section 12022.53(b)) (*id.,* subd. (b)); a 20-year enhancement for the personal and intentional discharge of a firearm under section 12022.53, subdivision (c) (section 12022.53(c)) (*id.*, § subd. (c)); and a 25-year-to-life enhancement for the personal and intentional discharge of a firearm causing great bodily injury or death under section 12022.53(d) (*id.*, § subd. (d).).

Effective January 1, 2018, the Legislature enacted SB 620, which amended section 12022.53(h), to state: "The court may, in the interest of

justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§ 12022.53, subd. (h).) Former section 12022.53(h), prohibited courts from striking or dismissing firearm enhancements found true under section 12022.53, "[n]otwithstanding [s]ection 1385 or any other provision of law." (Former § 12022.53, subd. (h).)

A trial court's refusal to dismiss a section 12022.53 firearm enhancement is reviewed under the deferential abuse of discretion standard. (*People v. Pearson* (2019) 38 Cal.App.5th 112, 116.)[3] "When being sentenced, a defendant is entitled to decisions made by a court exercising informed discretion. [Citation.] A court acting while unaware of the scope of its discretion is understood to have abused it." (*Tirado II*, *supra*, 12 Cal.5th at p. 694.)

3. Analysis

To support his contention that his case should be remanded because the court failed to consider the lesser enhancement, Esquivel relies on *Morrison*, *supra*, 34 Cal.App.5th 217. There, Division Five of this court held that amended section 12022.53(h) not only gave a trial court the authority to strike or dismiss a firearm enhancement, but also to impose a lesser firearm enhancement in the exercise of a court's discretion. (*Id.* at p. 222.)

Other courts have rejected *Morrison*'s holding. In *People v. Tirado* (2019) 38 Cal.App.5th 637 (*Tirado I*), review granted November 13, 2019, S257658, the Fifth District Court of Appeal disagreed with the court in *Morrison*, noting that "[n]othing in the plain language of sections 1385 or

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[3] The People contend this appeal presents issues of statutory interpretation which we review de novo. We need not resolve this disagreement because we conclude the court's order must be reversed under any standard.

12022.53, subdivision (h) authorizes a trial court to substitute one enhancement for another." (*Tirado I*, *supra,* at p. 643.) In *People v. Garcia* (2020) 46 Cal.App.5th 786 – the case the court referred to at Esquivel's resentencing hearing – the court agreed with the Fifth District in *Tirado I* "that section 12022.53, subdivision (h) does not grant a trial court the discretion to substitute lesser included firearm enhancements, at least where the greater enhancement is legally and factually valid." (*Garcia*, *supra*, at pp. 790–791.) Later, Division One of this court decided *Delavega*, *supra*, 59 Cal.App.5th 1074 – the case defense counsel referenced at the resentencing hearing – which also agreed with the Fifth District's *Tirado I* line of cases and held that section 12022.53(h) did not give the trial court the power to strike a legally and factually supported enhancement found true and impose a lesser enhancement that was not found true. (*Delavega*, *supra*, at p. 1094.)

While this appeal was pending, this conflict between *Morrison* and the contrary line of cases was resolved by our Supreme Court in *Tirado II*, *supra*, 12 Cal.5th at pp. 696–697. There, the Court concluded "*Morrison* correctly described the scope of a trial court's sentencing discretion under section 12022.53." (*Tirado II*, *supra*, 12 Cal.5th at p. 697.) At the outset, the Court noted that a trial court is not categorically prohibited from imposing a lesser included, uncharged enhancement so long as the prosecution has charged the greater enhancement and the facts supporting the lesser enhancement have been alleged and found true. (*Id.* at pp. 697–698 [citing several cases applying this principle including *People v. Strickland* (1974) 11 Cal.3d 946 and *People v. Fiahlo* (2014) 229 Cal.App.4th 1389].) It found no authority which conditioned a trial court's power to impose an uncharged enhancement on the charged and adjudicated enhancement being legally or factually inapplicable. (*Tirado II*, *supra*, at p. 699.) Nor did section 12022.53 bar a

trial court from imposing an enhancement under section 12022.53(b) or (c) when those enhancements were not specifically listed in the accusatory pleading but the facts giving rise to the enhancement were alleged and found true. (*Id.* at p. 700.) The court further noted that section 12022.53, subdivision (j) authorized the imposition of enhancements under section 12022.53 if "the existence of any fact required by subdivision (b), (c), or (d) [is] alleged in the accusatory pleading and admitted or found [to be] true." (*Ibid.*) Thus, the Court concluded the section 12022.53 statutory framework permits a court to strike a section 12022.53(d) enhancement found true by the jury and instead impose a lesser uncharged statutory enhancement. (*Ibid.* ["To summarize: When an accusatory pleading alleges and the jury finds true the facts supporting a section 12022.53(d) enhancement, and the court determines that the section 12022.53(d) enhancement should be struck or dismissed under section 12022.53(h), the court may, under section 12022.53(j), impose an enhancement under section 12022.53(b) or (c)."].)[4]

Here, the record shows the trial court did not understand it could impose a lesser included enhancement in lieu of the charged section 12022.53(d) firearm enhancement found true by the jury when it declined to strike Esquivel's 25-year-term firearm enhancement. The record further shows that if the trial court understood it had a choice to impose a lesser included firearm enhancement instead of the greater one imposed, it might have done so. *Tirado II* has clarified that the section 12022.53 statutory framework permits a court to strike the section 12022.53(d) enhancement

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[4] The Supreme Court subsequently ordered the *Delavega* and *Garcia* opinions vacated and depublished. (See *Delavega*, *supra*, 59 Cal.App.5th 1074, ordered to be vacated and depublished Apr. 20, 2022, S267293; *Garcia*, *supra*, 46 Cal.App.5th 786, ordered to be vacated and depublished Apr. 20, 2022, S261772.)

found true by a jury and to impose a lesser charged enhancement instead. In light of this new controlling authority, a remand to the trial court for resentencing is warranted for the trial court to consider whether to strike the greater firearm enhancement and impose a lesser included enhancement in its place. We express no opinion as to how the court should exercise its discretion on this issue on remand.

B. AB 333

In his supplemental briefing, Esquivel contends the changes to the criminal gang statute enacted by AB 333 warrant reversal of all, or at least some, of his convictions.

AB 333 added a new section to the Penal Code, section 1109. Among other things, this new section requires, upon a defendant's request, the substantive offense of active participation in a criminal street gang (§ 186.22, subd. (a)) to be "tried separately from all other counts that do not otherwise require gang evidence as an element of the crime." (§ 1109, subd. (b).) It also amended section 186.22's definition of "criminal street gang" and "pattern of criminal gang activity" to impose a greater burden of proof on the prosecution to establish a defendant's active participation in a criminal street gang and a gang enhancement. We consider Esquivel's arguments under the newly enacted section 1109 and the amended section 186.22 in turn.

1. Section 1109

At trial, Esquivel moved to bifurcate his trial on the gang charges and gang enhancement allegations, which the prosecution opposed. Following a hearing, the court denied bifurcation.

In his supplemental opening brief, Esquivel contends the entire judgment against him must be reversed due to the retroactive application of

newly enacted section 1109, which requires bifurcation of trial on the gang offense and gang enhancement allegations.

In cases tried before AB 333 took effect, trial courts had discretion to bifurcate the trial of an underlying offense from the trial of a section 186.22 gang enhancement if the court believed admission of gang evidence would be too prejudicial. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*).) Such a risk of prejudice, however, was reduced where the gang evidence to be admitted was relevant to "help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*Id.* at p. 1049.) A defendant bore the burden to establish that the substantial danger of undue prejudice outweighed the considerations favoring one, unitary trial. (*Id.* at p. 1050),

Added to the Penal Code by AB 333, section 1109 changed that framework. Now, under section 1109, upon a request by the defense, "a case in which a gang enhancement is charged under subdivision (b) or (d) of Section 186.22 shall be tried in separate phases as follows: (1) The question of the defendant's guilt of the underlying offense shall be first determined. [¶] (2) If the defendant is found guilty of the underlying offense and there is an allegation of an enhancement under subdivision (b) or (d) of Section 186.22, there shall be further proceedings to the trier of fact on the question of the truth of the enhancement." (§ 1109, subd. (a)(1)–(2).) Upon a request by the defense, the new section 1109 also requires the substantive offense of active participation in a criminal street gang (§ 186.22, subd. (a)) to be "tried separately from all other counts that do not otherwise require gang evidence as an element of the crime." (§ 1109, subd. (b).)

As an initial matter, the parties disagree as to whether section 1109 can be applied retroactively and whether the failure to bifurcate constitutes

structural error requiring automatic reversal. Esquivel contends that *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) – which establishes a presumption of retroactivity for amendments to statutes that reduce punishment for a particular crime (see *id.* at pp. 746–748) – "mandates retroactive application of newly enacted section 1109 to all cases, not yet final, in which a jury convicted a defendant after a defense request for bifurcation was denied." He also argues the trial court's failure to bifurcate is a structural error that requires this court to reverse the judgment without undertaking any harmless error inquiry.

The People contend that section 1109 is not retroactive and that recent decisions, *People v. Burgos* (2022) 77 Cal.App.5th 550 (*Burgos*) and *People v. Ramos* (2022) 77 Cal.App.5th 1116 (*Ramos*), holding that section 1109 applies retroactively were "poorly decided" and incorrectly applied the *Estrada* rule. The People further contend that structural error principles do not apply to section 1109. If the trial court erred for denying bifurcation, they contend it was harmless error that does not warrant reversal.

AB 333 does not expressly address whether section 1109 was intended to apply retroactively or only prospectively. (See Stats. 2021, ch. 699.) There is currently a split in authority on this issue. As the parties note, the majority in *Burgos* concluded that section 1109 applies retroactively in part because the new statute increases the possibility of acquittal which necessarily reduces possible punishment. (*Burgos*, *supra*, 77 Cal.App.5th at p. 568.) The court in *Ramos*, *supra*, 77 Cal.App.5th 1116, likewise concluded that since AB 333 was "aimed at mitigating wrongful punishment resulting from the admission of prejudicial and harmful gang evidence," it implicated the *Estrada* presumption with respect to section 1109. (*Id.* at p. 1131.) The dissent in *Burgos* disagreed with the majority's conclusion regarding

retroactivity. (See *Burgos*, at pp. 569–575 (dis. opn. of Elia, J.).) The dissent explained, "In my view, section 1109 is not an *ameliorative* statute within the meaning of the *Estrada* rule, and therefore it is subject to the *general rule* that Penal Code provisions are presented to be prospective-only." (*Burgos*, at p. 569.) More recently, the court in *People v. Perez* (2022) 78 Cal.App.5th 192 (*Perez*), decided that section 1109 does not apply retroactively. (*Id.* at p. 207.) In its view, section 1109 is "a procedural statute that ensures a jury will not be prejudiced by the introduction of evidence to support gang enhancement allegations–it does not reduce the punishment imposed." (*Ibid.*)

Here, we need not decide whether section 1109 operates retroactively or only prospectively because, even assuming retroactive application, we conclude the failure to bifurcate in this case was harmless error.

In reaching this conclusion, we readily dismiss Esquivel's contention that such an error is structural and hence requires automatic reversal. A structural error "is the type of error 'affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself,' one that ' "transcends the criminal process" ' and 'def[ies] analysis by "harmless-error" standards.' [Citation.] Examples of structural defects include total deprivation of the right to counsel at trial [citation]; trial before a judge who is not impartial [citation]; and the giving of a constitutionally defective instruction on reasonable doubt [citation]. Trial errors, by contrast, are errors that 'occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented' in order to determine whether the error was harmless. [Citation.] There is a strong presumption any error falls within the latter category, and it is the rare case in which a constitutional violation will not be subject to harmless error analysis." (*People v. Marshall* (1996) 13 Cal.4th

799, 851; see also *McCoy v. Louisiana* (2018) __ U.S. ___, 138 S.Ct. 1500, 1511 ["Structural error 'affect[s] the framework within which the trial proceeds,' as distinguished from a lapse or flaw that is 'simply an error in the trial process itself.' "].) We are unpersuaded that a failure to bifurcate was a structural defect. The admission of evidence on a gang offense and gang enhancement allegations in a proceeding that is not bifurcated does not affect the framework of a trial, and the effect of the erroneous admission of such evidence may be quantitatively assessed. It is therefore trial error amenable to a harmless error analysis. (See, e.g., *Ramos*, *supra*, 77 Cal.App.5th at p. 1125 [applying harmless error analysis to section 1109 claim]; *People v. E.H.* (2022) 75 Cal.App.5th 467, 480 (*E.H.*) [same].)

Esquivel relies on *Burgos*, *supra*, 77 Cal.App.5th 550, to support his claim of structural error. There, the court found it "difficult to determine how the outcome of the trial would have been affected if it had been bifurcated to try the gang enhancements separately; the nature of the proceeding would have been entirely different." (*Id.* at p. 568.) The majority further noted that the " 'defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." ' " (*Ibid.*) The court observed, "Bifurcation necessarily affects the ' "framework within which the trial proceeds." ' " (*Ibid.*) We are not persuaded by this structural error analysis in *Burgos*, nor does it control. *Burgos* stated only that a failure to bifurcate under section 1009 "*likely* constitutes 'structural error' because it 'def[ies] analysis by harmless-error standards.' " (*Ibid.*, emphasis added.) It did not hold that a structural error analysis applied. Rather, the court assumed an assessment of prejudice was required and ultimately concluded that the defendants suffered prejudice under a harmless error standard. (*Ibid.)*

Further, we need not determine whether our harmless error analysis should apply the state law standard under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*), or the federal law standard set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). Under *Watson*, an error is harmless and does not warrant reversal unless a reasonable probability exists that in the absence of the error, a result more favorable to the appealing party would have been reached. (*Watson,* at p. 837.) Under *Chapman*, an error must be harmless beyond a reasonable doubt. (*Chapman*, at p. 818.) We conclude Esquivel did not suffer prejudice under either standard.

The independent evidence for the murder and firearm charges was strong. It was uncontroverted that Esquivel fatally shot Harold. Esquivel admitted to shooting Harold, and multiple percipient witnesses testified that they saw Esquivel do so. Three witnesses also observed that the shooting was unprovoked by any aggressive action by the victim. There was strong evidence that Esquivel was the aggressor and no forensic evidence supporting a claim to self-defense. Notably, the testifying pathologist had not seen any soot or stippling on the victim, so opined that the gunshot wound that entered the victim's chest was not a close contact wound; the lack of soot and stippling indicated to him that his wounds were not close contact wounds. The pathologist also testified that he did not see any injuries on the victim's hands indicating that they were used as a weapon, which contradicted Esquivel's testimony that he shot Harold while in close contact with the victim after the two jostled for the gun. Unsurprisingly, the jury rejected Esquivel's claim to self-defense. Thus, even if section 1109 applied retroactively (an issue we do not decide), we cannot conclude Esquivel was prejudiced by the trial court's failure to bifurcate the trial of the gang offense

from the gang enhancement allegations in light of the overwhelming evidence supporting the first degree murder and firearm convictions.

In addition, the evidence of the gang predicate offenses was circumscribed and harmless under any standard of review. The trial court gave the jury a limiting instruction regarding its consideration of the gang evidence, explaining to jurors they "may not consider evidence relating to gang activities for any other purpose. Specifically, you may not conclude from this evidence that a defendant is a person of bad character or that he generally has a disposition to commit crime." We presume it followed the instruction. (See *People v. Franklin* (2016) 248 Cal.App.4th 938, 953 ["We presume that the jury followed these limiting instructions (regarding considering gang evidence for limited purpose), and there is nothing in this record to rebut that presumption"].) Since the jury's verdicts against Esquivel were based on the evidence – not improper bias – bifurcation would not have aided him.

2. Amended Section 186.22

Esquivel contends that if we decline to reverse the entire judgment based on section 1109, we must nonetheless reverse his gang offense conviction and the gang enhancement to his murder conviction based on the retroactive application of amendments to section 186.22 enacted by AB 333 while his appeal was pending. He contends that AB 333 raised the bar of proof for the gang offense and gang enhancement in several ways, and the "jury never made determinations concerning the sufficiency of proof under the amended statute." He asserts his case should be remanded to allow the People to decide whether to retry him on the gang offense and gang enhancement allegations under the amended statute. We agree.

a. Additional Background

The gang evidence presented to the jury is set forth at length in our *Esquivel I* opinion and repeated in part here. Pittsburg Police Detective Charles Blazer, who was qualified as an expert in criminal street gangs, provided detailed information on a Norteño-affiliated gang known by various names, including the "Bully Boyz Crew." Blazer testified that the Norteño gang's primary activities were murder, assaults with non-deadly and deadly weapons (both firearms and non-firearms), burglary, sales of narcotics including marijuana, methamphetamine, and cocaine, possession of concealable firearms, and other various crimes. The crimes were committed for the purpose of achieving, "respect, revenue and . . . revenge."

Relevant here, Blazer testified to several predicate criminal offenses for which various Bully Boyz gang members were convicted: (1) voluntary manslaughter committed in July 2005, as substantiated by a certified record of conviction; (2) assault with a firearm, shooting from a motor vehicle, discharge of a firearm with gross negligence, and carrying a concealed firearm in March 11, 2008, as substantiated by a certified record of conviction and testimony of a percipient witness; (3) permitting the discharge of a firearm from a motor vehicle committed on March 11, 2008, as substantiated by a certified record of conviction and testimony of a percipient witness; (4) carrying a concealed weapon committed in November 2008, as substantiated by a certified record of conviction; (5) possession of methamphetamines in January 2009 and possession of narcotics for sale in August 2009, as substantiated by certified records of convictions and testimony of Blazer who was personally involved in the arrest and search of an apartment; (6) possession of marijuana for sale committed in June 2010, as substantiated by a certified record of conviction and testimony of Blazer who was personally

involved in the arrest and search; and (7) attempted murder of a police officer and felon in possession of a firearm in May 2011, as substantiated by a certified record of conviction. With respect to predicate offenses (2) and (3), Blazer testified that the crimes were committed by Kevin H. and Cristobal N., respectively, as part of the same shootout on March 11, 2008, and appeared on the same docket.

The trial court instructed the jury on the requirements for proof of the offenses of active participation in a gang, as well as the requirements for proof of the gang enhancement. (See former CALCRIM No. 1400.) The instructions indicated that the gang offense and the gang enhancement required proof that Esquivel was a member of a "criminal street gang" that engaged in a "pattern of criminal activity." (*Ibid.*) As noted, the jury convicted Esquivel of the gang offense and found the gang enhancement allegations true.

b. Applicable Law

Section 186.22(a) makes it a crime to actively participate in a "criminal street gang" with knowledge that its members engage in, or have engaged in, a "pattern of criminal activity." (§ 186.22, subd. (a).) Section 186.22(b)(1) provides for enhanced punishment when a defendant is convicted of an enumerated felony committed "for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1)).

Five years after Esquivel's 2016 trial, AB 333 took effect and amended section 186.22 in several ways to increase the evidentiary burden necessary to prove the gang offense under section 186.22(a) and the gang enhancement under section 186.22(b)(1). (*People v. Rodriguez* (2022) 75 Cal.App.5th 816,

822 (*Rodriguez*).) Generally, the new law amended the definitions of "criminal street gang" and "pattern of criminal gang activity" and clarified the evidence needed to establish that an offense " 'benefit[s], promote[s], further[s], or assist[s]' " in criminal conduct by members of a gang. (*Perez*, *supra*, 78 Cal.App.5th at p. 206.)

Specifically, and relevant to this appeal, AB 333 narrowed the definition of "criminal street gang." At the time of Esquivel's trial, "criminal street gang" was defined as "an ongoing, organized association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in subdivision (e), having a common name or common identifying sign or symbol, and whose members *individually or collectively* engage in, or have engaged in, a pattern of criminal gang activity." (Former § 186.22, subd. (f), emphasis added.) AB 333 revised the definition of "criminal street gang" to require that members "*collectively*" (no longer "individually or collectively") engaged in a pattern of criminal activity. (§ 186.22, subd. (f), emphasis added; *People v. Delgado* (2022) 74 Cal.App.5th 1067, 1086 (*Delgado*).)

Also relevant here, AB 333 redefined " 'pattern of criminal gang activity' " (§ 186.22, subd. (e)(1)), a necessary requirement to proving the existence of a "criminal street gang" and thus a "prerequisite to proving the gang crime and the gang enhancement." (See § 186.22, subds. (a), (b)(1); *Rodriguez*, *supra,* 75 Cal.App.5th at p. 823.) "The offenses comprising a pattern of criminal gang activity are referred to as predicate offenses." (*Id.* at p. 822.) At the time of Esquivel's trial, "pattern of criminal activity" meant "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of

the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (Former § 186.22, subd. (e).) Under this former definition, the prosecution only had to prove that those associated with a gang had committed at least two offenses from a list of predicate crimes on separate occasions within three years of one another. (Former § 186.22, subd. (e); see *People v. Sek* (2022) 74 Cal.App.5th 657, 665.) It was unnecessary to prove the predicate offenses were gang related. (Former § 186.22, subd. (e); *Rodriguez*, *supra*, 75 Cal.App.5th at p. 822.)

The amended statute made several changes to the definition and limited the type of predicate offenses sufficient to prove the gang offense and gang enhancement. (See *E.H.*, *supra*, 75 Cal.App.5th at p. 477.) "First, the predicate offenses now must have been committed by two or more 'members' of the gang (as opposed to any persons). [Citation.] Second, the predicate offenses must be proven to have '*commonly* benefited a criminal street gang.' [Citation, emphasis added.] Third, the last predicate offense must have occurred within three years of the date of the currently charged offense. [Citation.] Fourth, the list of qualifying predicate offenses has been reduced. [Citation.] And fifth, the currently charged offense no longer counts as a predicate offense." (*Id.* at pp. 477–478; § 186.22, subd. (e)(1), (e)(2).) Most notably, the new element that the predicate offenses "commonly benefited a criminal street gang" requires that "the common benefit of the offense is more than reputational." (§ 186.22, subd. (e)(1).) A new subdivision (g) was also added specifying that "[e]xamples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or

silencing of a potential current or previous witness or informant." (§ 186.22, subd. (g).)

c. Analysis

The parties agree, as do we, that AB 333's amendments to section 186.22 apply retroactively to this case, which is not yet final on appeal. Since the amendments to section 186.22 increase the threshold for conviction of a section 186.22 offense and imposition of the enhancement, Esquivel – whose judgment of conviction is not yet final – is entitled to the benefit of these changes in the law. (See *E.H.*, *supra*, 75 Cal.App.5th at p. 478; *People v. Lopez* (2021) 73 Cal.App.5th 327, 344.)

The parties disagree, however, about the effect of the changes. Noting that AB 333 "raise[d] the bar of proof for gang offenses and gang enhancements in several ways," Esquivel contends his "jury never made determinations concerning the sufficiency of proof under the amended statute." The People argue that "even had the jury been instructed under the current version of the law, it would have reached the same conclusions it reached under the former version of the law" and any deficiency in the jury instructions was harmless beyond a reasonable doubt. In agreeing with Esquivel, we conclude the changes made by AB 333 to the gang statute undermined Esquivel's conviction on the gang offense under section 186.22(a) as well as the jury's true finding on the gang enhancement allegations under section 186.22(b).

First, the jury did not determine whether the evidence adduced at Esquivel's 2016 trial was sufficient to prove the existence of a "criminal street gang" under the amended law. As noted, the revised definition of "criminal street gang," requires the prosecution to prove in part a defendant participated in a group "whose members *collectively* engage in, or have

engaged in, a pattern of criminal activity." (§186.22, subd. (f), emphasis added.) Of the seven predicate offenses presented by the prosecution, only two were committed on the same occasion (March 11, 2008) as part of the same offense. The five other predicate offenses involved individual offenses committed on separate occasions without any apparent relation. This evidence – isolated individual crimes except for the two committed on March 11, 2008 – would not sufficiently prove the Bully Boyz "*collectively* engage in, or have engaged in" a pattern of criminal activity.

Second, the jury was not allowed to consider whether the evidence adduced at Esquivel's 2016 trial was sufficient to prove a "pattern of criminal activity" under the amended law. As noted, as amended by AB 333, the revised definition of "pattern of criminal gang activity" increased the threshold of proof for the predicate offenses necessary for the gang enhancement. (§ 186.22, subd. (e)(1).) This included the notable new requirement of a common benefit to the gang derived from the predicate offenses, and that benefit be more than reputational (§ 186.22, subd. (e)(1) [" 'pattern of criminal gang activity' means . . . . the offenses commonly benefited a criminal street gang, and the common benefit of the offense is more than reputational"].) The evidence of the seven predicate offenses included no evidence indicating how any offense provided a common benefit to the gang, let alone any common benefit that was not reputational. Blazer's testimony on the predicate offenses succinctly identified the offense, the perpetrator, and Blazer's view on whether the perpetrator was a member of the Bully Boyz at the time of the offense. He did not discuss how any predicate offense commonly benefited the gang. Absent any reference in Blazer's testimony or any other evidence of a common benefit the Bully Boyz derived from the predicate offenses, the evidence from the 2016 trial was

insufficient to establish the Bully Boyz were a criminal street gang that engaged in a "pattern of criminal activity" as required under the amended statute.

The People counter that "remand is unnecessary because the jury would have found those allegations true even under AB 333's more stringent new requirements." They contend there was ample evidence presented at trial that the Bully Boyz qualified as a criminal street gang, even under the current version of 186.22, subdivision (f). In particular, "the nature and number of predicate offenses, committed by many different gang members on several different dates, shows that the Bully Boyz 'collectively' engaged in a pattern of gang activity." We are not persuaded.

As noted, of the seven predicate offenses Blazer testified to, only two were committed on the same occasion as part of the same criminal activity. The People provide no authority that evidence consisting largely of individual gang members committing the predicate offenses on separate occasions adequately shows the gang members "collectively engage" in a pattern of criminal activity. Other courts have rejected such an interpretation of section 186.22, subdivision (f), as amended. (See *Delgado*, *supra*, 74 Cal.App.5th at pp. 1088–1090 [construing section 186.22, subdivision (f) requirement that gang members "collectively engage" in criminal activity to require the prosecution prove that two or more gang members committed each predicate offense in concert]; *Lopez*, *supra*, 73 Cal.App.5th at pp. 344–345 [noting AB 333 requires prosecution to prove collective, not merely individual, engagement in a pattern of criminal activity].) We agree with these constructions of the amended statute and therefore conclude the evidence presented at Esquivel's 2016 trial was not enough to establish the

crimes committed by the various individual gang member constitute collective criminal activity by the Bully Boyz under the current statute.

The People further argue that "*[m]ost* of [the] criteria" established by the new law were satisfied in the present case. (Emphasis added.) It is instructive that the People cannot argue *all* of the criteria established by the new law have been satisfied. While we do not take issue that the evidence presented at trial likely satisfied the temporal requirements set forth in the newly amended section 186.22(e)(1), we are simply not convinced by the People's conclusory statement that the evidence of predicate offenses presented at trial "satisfied the current version of section 186.22, subdivision (e), as amended by AB 333." Again, there was no evidence of a common benefit the Bully Boyz derived from the predicate offenses – a key element under the amended statute – and the People cite no evidence in the trial record demonstrating the Bully Boyz derived any of the enumerated common benefits from the predicate offenses discussed.

Under these circumstances, we conclude the gang offense and gang enhancement must be vacated. Where newly required elements were never tried to the jury, the proper remedy for the failure of proof is to remand and given the People an opportunity to retry the affected charges and meet its burden of proof with respect to AB 333's new requirements. (*E.H.*, *supra*, 75 Cal.App.5th at p. 480; *People v. Vazquez* (2022) 74 Cal.App.5th 1021, 1033.) Therefore, this case is remanded to afford the prosecution an opportunity to retry the gang participation charge and gang enhancements to meet its new burden of proof pursuant to the requirements of AB 333. If the prosecution does not elect to retry Esquivel on the gang participation offense or the gang enhancement, the trial court shall resentence him accordingly.

DISPOSITION

We reverse the trial court's order denying Esquivel's motion for resentencing. We also vacate Esquivel's section 186.22(a) gang offense conviction and the section 186.22(b) true gang enhancement finding associated with his first degree murder conviction.

We remand the matter for further proceedings. On remand, the People may elect to retry Esquivel on the gang offense and gang enhancement allegations under the new law established by AB 333. If the People do not elect to retry Esquivel, then the trial court shall resentence him accordingly. In resentencing, the trial court may also consider whether to strike the greater firearm enhancement and impose a lesser included enhancement in its place. After such resentencing, the trial court is directed to issue a new minute order and an amended abstract of judgment which reflects whether it strikes or dismisses the existing firearm enhancement and imposes a lesser included enhancement in its place or reinstates the sentence on the firearm enhancement. The court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

In all other respects, we affirm the judgment.

Petrou, J.

WE CONCUR:

Fujisaki, Acting P.J.

Rodríguez, J.

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